Supreme Court, U.S.
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No. 93-334

In The

Supreme Court of the United States

October Term, 1993

NICK GARCIA,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, and WARREN LUTTRELL,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Judicial District Of Texas

BRIEF FOR SOUTHERN PACIFIC TRANSPORTATION COMPANY IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state courts below committed reversible error in instructing the jury on unavoidable accident in a case involving both common law defendants and a railroad carrier under the Federal Employers' Liability Act (FELA) where the Petitioner failed to timely and properly object to such instruction and there was sufficient evidence to support the submission of such jury instruction.

2. Whether the state courts below committed reversible error in submitting Question No. 1 to the jury concerning the defendants' negligence and causation of the occurrence in question since a violation of Part 135 of the Federal Aviation Regulations is not negligence per se and could neither have been a proximate cause nor cause in whole or in part of the occurrence in question.

LIST OF ALL PARTIES TO PROCEEDING

PETITIONER:

NICK GARCIA

RESPONDENTS:

SOUTHERN PACIFIC TRANSPORTATION COMPANY
JACKIE HOLMES
MIKE WARREN
SOUTHWEST AIR LEASING
GENE'S FLIGHT CLUB OF EL PASO
WARREN LUTTRELL

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OPINION BELOW

The opinion of the Ninth Court of Appeals of the State of Texas is unpublished but a copy of such opinion is found in the appendix to this brief.

JURISDICTION

The judgment of the Ninth Court of Appeals for the State of Texas was entered on December 3, 1992. After a petition for rehearing was denied on January 7, 1993, the Petitioner filed an Application for Writ of Error in the Texas Supreme Court on February 19, 1993. The Texas Supreme Court entered an order on April 14, 1993 denying the Petitioner's Application for Writ of Error. The petition for a writ of certiorari was received by Respondent on September 1, 1993. Petitioner alleges jurisdiction of this court is invoked under 28 U.S.C. Section 1257.

Considerations Governing Review On Writ of Certiorari Are Not Met

Despite the provisions of Rule 10, *Rules of The Supreme Court*, Petitioner makes no showing that the Texas Supreme Court in this case has either decided:

(a) a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or

(b) an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Thus, Petitioner's petition should be denied.

STATEMENT OF THE CASE

This is a suit by the Petitioner, Nick Garcia, seeking to recover actual and punitive damages arising out of an airplane incident that occurred at El Paso, Texas on August 2, 1988. The Petitioner, an employee of Southern Pacific Transportation Company, was riding in an airplane owned by Jackie Holmes and piloted by Warren Luttrell when it made a hard landing as it made its approach to the El Paso, Texas International Airport. The Petitioner sued Jackie Holmes, individually and doing business as Southwest Air Leasing, the owner of the airplane; Warren Luttrell, the pilot of the plane; Southern Pacific Transportation Company, the Petitioner's employer who had contracted with Southwest Aviation, Inc. to transport its employees when they were being "deadheaded" back to their duty station; Mike Warren, the former owner of the airplane; and Gene's Flight Club of El Paso, which supplied the pilot.

The case was submitted to the jury based on common law negligence and negligence under the Federal Employers' Liability Act (FELA). The jury acquitted all of the defendants of any negligence, whether a proximate cause or a cause in whole or in part of the occurrence in question. The trial court entered judgment for the defendants based upon the jury verdict. The Petitioner appealed the judgment to the Ninth Court of Appeals at Beaumont, which affirmed the judgment of the trial court. The Petitioner then filed his application for writ of error in the Texas Supreme Court which denied his application. The Petitioner has now filed a petition for writ of certiorari.

Petitioner's Misstatements or Omissions of Fact and Law

Pursuant to Rule 15, *Rules of the Supreme Court*, Respondent Southern Pacific addresses the following perceived misstatements or omissions contained in Petitioner's Petition for Writ of Certiorari:

A. FACTS:

1. Petitioner's contention that he had a "serious and permanent lower back injury as a result of the crash" was hotly disputed. Immediately after the incident, the pilot asked all passengers if anyone was hurt and all of them responded in the negative. Petitioner did not see Dr. Biegonowski, who appeared at trial, until two weeks after the incident. Dr. Earl Rafes examined Petitioner and formed a clinical impression that he did not have any neurological abnormality nor orthopedic deficit. Dr. Rafes had an MRI performed on Petitioner, and that procedure confirmed Dr. Rafes' opinion because it was an essentially normal study.[1]

2. Contrary to Rule 24.6, Rules of the Supreme Court, Petitioner includes irrelevant and immaterial information in footnote 9 of his Petition by stating that other passengers settled their claims. Such information is totally outside the record of this case and serves only to prejudice Respondent.

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[1] Thus, the jury may have determined that Plaintiff suffered no injury. If so, under the broad form submission of Question No. One (see footnote No. 2), the jury would have answered "No" to all of its subparts, just as it actually did.

3. Petitioner's description of the plane's landing omits several important undisputed matters: the airport was not closed at the time of the landing; other planes were landing and taking off at the time of the landing; pilot Luttrell received Instrument Flight Rules (IFR) clearance to land, but because he could actually see the runway at the time of landing went in on a visual approach; the Federal Aviation Administration (FAA) did not find Mr. Luttrell negligent for flying into a thunderstorm or for landing the plane in a thunderstorm or for flying Visual Flight Rules (VFR) as opposed to IFR; the FAA described the occurrence in question as an "incident" not an "accident" and found there was a "hard landing" not a "crash". Further, Mr. Luttrell's undisputed testimony was that the plane's emergency landing transponder was activated when the plane's nose wheel collapsed *after* the landing, not on the landing itself.

4. As to contractual arrangements for charter flights, Southern Pacific thought it was contracting with Southwest Aviation, Inc., a long time charter operator in the El Paso area, to fly its employees. An uncontested summary judgment was entered on behalf of Southwest Aviation as it was determined that Defendant Mike Warren falsely represented himself as being authorized by Southwest Aviation, Inc. to contract on its behalf with Southern Pacific. Neither the records nor facts developed at trial showed that Southern Pacific was aware that it was contracting with any entity other than Southwest Aviation, Inc.

B. LAW:

1. Despite Petitioner's suggestion to the contrary, an unavoidable accident instruction is permissible under Texas law when raised by the evidence, as was recently explained by the Texas Supreme Court in *Hill v. Winn Dixie Texas, Inc.*, 849 S.W.2d 802 (Tex. 1992).

REASONS FOR DENYING THE WRIT

I. The Writ Should be Denied Because the Courts Below Committed No Reversible Error in Instructing the Jury on Unavoidable Accident in a Case Involving Both Common Law Defendants and a Railroad Carrier Sued Under the FELA Where the Petitioner Failed to Timely and Properly Object to Such Instruction and There Was Sufficient Evidence to Support Its Submission.

A. WAIVER: Petitioner Failed To Object Timely and Properly That An Unavoidable Accident Instruction Is Improper in an FELA Case.

Texas procedural law is clear that a party must specifically object to defects in the charge to avoid waiver. Tex. R. Civ. P. 274. Petitioner failed to observe this Rule. At no time prior to submission of the case to the jury did Petitioner properly object that an instruction on unavoidable accident is improper as a matter of law in an FELA case, the point he now raises on appeal. Petitioner thus waived any error on those grounds. *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986).

Texas Rule of Civil Procedure 274 provides:

> "A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. *Any complaint as to a* question, *definition, or instruction,* on account of any defect, omission, or fault in pleading, *is waived unless specifically included in the objections . . .* " (emphasis supplied).

Rule 274's purpose is to allow trial courts "to correct errors in the charge, by requiring objections both to clearly designate the error and to explain the grounds for the complaint." *Castleberry,* 721 S.W.2d at 276. (citing other cases: *Brown v. American Transfer & Storage,* 601 S.W.2d 931, 938 (Tex. 1980); *Davis v. Campbell,* 572 S.W.2d 660, 663 (Tex. 1978)). It is not sufficient that objection was made on other grounds. *Davis,* 572 S.W.2d at 663.

Petitioner does not and cannot contend that he properly objected at trial to the unavoidable accident instruction on the grounds that this was an FELA case, though he presents argument as if he had so objected. Petitioner's sole objection at trial to the unavoidable accident instruction was that Warren Luttrell's negligence was established as a matter of law. Now Petitioner seeks to raise new objections on appeal and that, he cannot do. Texas law is well settled that Petitioner may not raise new objections on appeal. *Lakeway Land Co. v. Kizer,* 796 S.W.2d 820 (Tex.App. – Austin 1990, writ denied); *Texaco, Inc. v. Pennzoil, Co.,* 729 S.W.2d 768, 819-20 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed* 485 U.S. 994, 108 S.Ct. 1305, 99 L.Ed.2d 686 (1988).

> "With regard to the first instruction, appellant failed to properly preserve his complaint for

> appellate review. *We note that a party is confined to the jury-instruction objection made at trial; any variant complaint on appeal is waived.* (citing other cases) . . . " (emphasis supplied). *Lakeway*, 796 S.W.2d 820, 825.

Thus, Petitioner waived his objection that an unavoidable accident instruction is impermissible in an FELA case by failing to make it at trial. However, even if Petitioner had so objected, the instruction would have been proper because of the presence of common law defendants.

B. COMMON LAW DEFENDANTS

This lawsuit, by Petitioner's own design, is not a pure FELA case. Rather it is one that combines common law and FELA causes of action and parties. Defendant Southern Pacific was sued for negligence under FELA, but Petitioner also alleged common law negligence against defendants Holmes, Luttrell, Gene's Flight Club, and Warren, and sought findings of gross negligence against each as well as recovery of exemplary damages. The common law defendants, thus, were entitled to have the jury apply instructions appropriate for a common law negligence suit to the common law causation standard, proximate cause, even if the causes of action alleged against them were made in a suit involving an FELA defendant.

An "unavoidable accident" instruction is proper in an FELA case that includes common law defendants, when the instruction is raised by the evidence. *Smith v. Illinois Central R.R. Co.*, 486 F.2d 943, 945 (5th Cir. 1973).

The instant case meets the *Smith* standard. It involves common law defendants and, as discussed below, the instruction was raised by the evidence. Moreover, Petitioner never abandoned his common law actions, but rather pursued them vigorously. In addition to the common law negligence submission of Question One, the Petitioner also obtained an issue on gross negligence against the common law defendants, and sought exemplary damages which may not be recovered against an FELA defendant. *Kozar v. Chesapeake and Ohio Railway Co.*, 449 F.2d 1238, 1240 (6th Cir. 1971). Accordingly, the common law defendants sought, and were entitled to, an "unavoidable accident" instruction.

To support his theory that an unavoidable accident instruction was inappropriate, Petitioner relies on two Fifth Circuit opinions: *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965), and *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966). Petitioner, however, fails to appreciate the fundamental difference between *Page* and *Mills*, on one hand, and this case, on the other: neither *Page* nor *Mills* involved common law causes of action or defendants; this case does. As the Fifth Circuit recognized in *Smith, supra*, (decided subsequent to *Page* [1965] and *Mills* [1966]), the presence of common law defendants in an otherwise FELA case requires different standards. Thus, in *Smith* the use of an "unavoidable accident" instruction in an FELA case that involved common law defendants was approved, as there was evidence to support the instruction. *Smith*, 486 F.2d at 945. The sufficiency of evidence in the instant case is discussed below in subsection C.

In addition, Petitioner was not harmed by the unavoidable accident instruction because the jury was precluded from applying it to the FELA causation standard. The jury considered the appropriate causation standard for both the common law negligence causes of action and the FELA cause of action. The causation standards for both types of negligence (proximate cause for common law negligence and cause in whole or in part for FELA negligence) were presented in Question One of the charge.[2] Question One was so structured in combination

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[2] QUESTION NO. 1, as presented and answered, is as follows:

Was the negligence, if any, of the defendants a cause, in whole or in part, or proximate cause, of the occurrence in question, and injury, if any, to Nick Garcia:

Answer "Yes" or "No" to each of the following:

	Answer "Yes" or "No"	
	Proximate Cause	Cause in Whole or in Part
a. Jackie Holmes	No	No
b. Warren Luttrell	No	No
c. Gene's Flight Club of El Paso, Inc.	No	No
d. Mike Warren	No	No
e. Southern Pacific	No	No

with the instructions[3] that the jury could not apply the FELA standard to the common law causes of action or vice versa without disregarding the court's instructions. Question One presented both causation standards, proximate cause and cause in whole or in part, as to each defendant, separately and distinctly. However, the jury was specifically told they could use the definition "unavoidable accident" only in determining proximate cause. By virtue of the definitions themselves, "unavoidable accident" was restricted to events "not *proximately caused* by the negligence of any party to it" (emphasis supplied). The trial court's instruction regarding definitions was as follows:

> 7. When words are used in this charge in a sense which varies from the meaning commonly

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[3] Three definitions provided in the Court's charge aided in establishing this structure:

* * *

> 4. "Cause In Whole or In Part" means a cause which played any part, no matter how small, in producing the injury for which damages are sought.
> 5. "Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event or some similar event might reasonably result therefrom. There may be more than one proximate cause of an event.

* * *

> 9. "Unavoidable Accident" means an occurrence may be an "unavoidable accident", that is, an event not *proximately* caused by the negligence of any party to it (emphasis supplied).

> understood, you will be given a proper legal definition, which you are bound to accept in place of any other meaning.

The jury, thus, was required to accept the definition of the FELA standard, "cause in whole or in part" just as it was given in the charge, and could not apply "unavoidable accident" to the FELA standard without disregarding the court's instruction. Under Texas law, an appellate court must assume that a jury properly followed the trial court's instructions. *Turner, Collie & Braden v. Brookhollow, Inc.*, 642 S.W.2d 160, 167 (Tex. 1982); *Times Herald Printing Co. v. A. H. Belo Corp.*, 820 S.W.2d 206, 213 (Tex. App. – Houston [14th Dist.] 1991, no writ history). Therefore, it must be assumed that the jury applied "unavoidable accident" only to the proximate cause standard of Question One, and not to the FELA standard. Petitioner, thus, suffered no injury because the unavoidable accident instruction is appropriate for common law causes of action where it is raised by the evidence.

C. SUFFICIENCY OF EVIDENCE

The common law defendants were entitled to an instruction on unavoidable accident because there was sufficient evidence to support it under Texas law.

An unavoidable accident instruction is appropriate in several circumstances. An unavoidable accident is present when an event occurs which was not proximately caused by the negligence of any party to the event. *Yarborough v. Berner*, 467 S.W.2d 188, 191 (Tex 1971); *Dallas Railway & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379, 385 (1952). Physical conditions or circumstances

("non-human" ones) can result in unavoidable accidents. *Yarborough*, at 191. The Texas Supreme Court recently stated that the instruction is ordinarily given in cases involving "environmental conditions such as fog, snow, sleet, wet or slick pavement, or obstruction of the view." *Hill v. Winn-Dixie Texas, Inc.*, 849 S.W.2d 802, 803 (Tex. 1992); *see, Yarborough* at 191. Environmental or weather conditions have often merited an unavoidable accident instruction. In *Blasberg v. Cockerell*, 254 S.W.2d 1012, 1014-15 (Tex. Civ. App. – Amarillo, 1952, writ refused n.r.e.), the court determined that unavoidable accident was raised by evidence regarding the rainy weather and slick pavement. Slick pavement on a rainy day is no less foreseeable than wind shears or currents in the vicinity of thunderstorms.

The instant case, too, involves non-human, environmental conditions or weather factors, i.e., a thunderstorm, with accompanying wind currents, and contains ample evidence of unavoidable accident.[4] Pilot Luttrell

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[4] Petitioner argues that there was "no evidence" to support an unavoidable accident instruction. However, the long accepted standard for determining a "no evidence" point under Texas law was recently articulated by the Texas Supreme Court in *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670 (Tex. 1990):

> " . . . In determining a 'no evidence' question, however, a court *must consider only that evidence and reasonable inferences therefrom that tend to support the jury findings*, disregarding all contrary evidence and inferences. *King v. Bauer*, 688 S.W.2d 845 (Tex. 1985) . . . " 786 S.W.2d 670, 671. (emphasis supplied)

Using the *Best* standard, one considers only the evidence and the reasonable inferences therefrom which support the trial court's instruction on unavoidable accident, and disregards all

testified that the flight to El Paso was smooth or better than average; that when he first contacted the tower he was advised that there was a thunderstorm in the vicinity of the airport and possible wind shear; that a wind shear advisory is not unusual for that time of year in El Paso but it is there daily in the afternoon; that he had flown in and out of the El Paso Airport for 25 years and that in the afternoon for three months of the year from June through September wind shear advisories are heard almost daily on the AIDEIS radio; that the radar turned him over to the tower when he was probably 8 or 10 miles from the runway; that he could see the thunderstorm at that time in the distance; that he could also see the airport at that time; that as he was turned over to the tower he could visually see the beginning of the runway with his naked eye; that the thunderstorm was not at his end of the runway because it had apparently already passed over it; that it was an isolated thundercell maybe one mile in diameter; *that he did not fly into the thunderstorm*; that he did not land on instruments that day because he was looking at the runway all the time visually; that it is better and safer to land visually than on instruments if one can see where one is going; that at that time he had the airport in sight and advised the tower that he was going to land visually and they cleared him to land; that there were planes landing before him and planes landing after him that day; that one airplane was waiting to take off at the time he was landing; that he was descending to

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evidence and inferences to the contrary. There was indeed ample evidence to support the trial court's instruction in this case.

the end of the runway; that he made a correction because of a wind shift in order to hold the alignment with the runway, and he made a couple of small adjustments there as the wind works on the aircraft, which is not unusual; that he was in control of the aircraft; that he was still on his descent and because of the possible wind shear he increased his normal air speed to have a safety advantage; that he increased his speed from 90 to 100 to 105 knots; that as he was approaching to make his final touchdown he had a sudden downshift which might have been a wind shear when he was 10 feet above the runway; that the aircraft settled down to the runway a little faster than he wanted and it did not glide as far through that 10 feet as it normally would have; that he did not crash into the runway; that he landed the plane but it was not a nice smooth landing; but it was not extremely hard either; that the plane maybe bounced back in the air 2 or 3 feet and came down and all the tires on the aircraft were intact; the landing gear was all intact and there were no blowouts; that as it started to roll down the runway the nosewheel retracted suddenly into the wheel well when he got another wind shear and the plane drifted to the left; that after the nosewheel retracted the nose went down and the propeller dropped into the runway asphalt and the plane stopped about 200 feet down the runway; that once he stopped he asked everybody in the plane if anyone was hurt and they told him that they were not hurt; that he called the tower and told him he was dead on the runway; that there were other planes landing on some other runway; that the emergency crew got there in a matter of minutes and they asked if anyone was hurt and all the passengers refused medical service; that just

before they landed there was not any severe turbulence; that he had never had an incident happen like this before; that he did not feel like he had done anything wrong that day; that the FAA did not charge him with flying into a thunderstorm *and he was never charged with any negligent act in this incident.*

Importantly, the thunderstorm had already passed over Luttrell's end of the runway and there was no thunderstorm in progress at the airport at the time of his landing. In addition, the thunderstorm actually was moving *away* from Luttrell – a significant point because it is in the leading edge of a storm that downdrafts and updrafts are primarily located.

Because the thunderstorm had "passed" before Luttrell tried to land, and because other planes were landing and taking off at that time, the jury reasonably could have inferred that the dangers of wind shear had passed also. In fact, they could have inferred that the turbulence he encountered on landing was not caused by the thunderstorm at all. Luttrell's conduct, in fact, complied with the standards set by Petitioner's own expert, Norman Horton. Mr. Horton testified that a pilot should either: (1) wait for a thunderstorm to pass or (2) land at an alternate airport. Pilot Luttrell waited for the storm to pass.

Mr. Horton also testified that there is always wind shear with a thunderstorm or a serious frontal disturbance, and that he faulted the pilot for flying into a thunderstorm of which he had been warned about ten minutes before he arrived at the airport. However, Mr. Horton admitted that he was assuming the pilot flew into a thunderstorm. Mr. Horton also admitted that wind

shear is a relatively common phenomenon at airports such as El Paso virtually the entire spring, summer and fall; that it is not uncommon in a desert/mountain environment like this to have a wind shear advisory; that as a pilot is coming down there is nothing on his plane that can detect wind shear because it is invisible; and that simpiy because a tower warns a pilot that there is wind shear in the area does not mean that he can not land.

Mr. Horton further admitted that he did not investigate this accident but merely analyzed the accident based on the investigation of others, principally the Federal Aviation Administration investigation report (its findings are discussed *infra*).

Horton agreed that the pilot is the final authority as to what he is going to do; that the pilot had landing clearance, i.e., permission to land, from the airport controller; that the tower did not close the airport on this occasion and the controllers in the tower did not tell the pilot he could not land; that the FAA had the authority to charge the pilot with negligence for flying into a storm, landing during wind shear, any of those things; but that they did not charge him nor did they make findings of negligence in how he landed or operated the airplane.

According to Mr. Horton, wind shears are "invisible" and planes have no instruments capable of detecting them. Thus, wind shears are a weather condition and fall within the category of non-human, environmental conditions for which the instruction of unavoidable accident is proper.

In addition, the jury could have reasoned that another non-human condition caused the accident, i.e.,

the nosegear's retracting. Texas courts have found that unavoidable accident instructions are proper in cases of mechanical or equipment failures. *McDonald v. Brennan*, 704 S.W.2d 136, 138 (Tex. App. – El Paso, 1986, writ refused n.r.e.); *Thurman v. Chandler*, 125 Tex. 34, 81 S.W.2d 489, 491 (1935).

Mr. Luttrell testified that the plane landed with all tires and landing gear intact. After the plane was taxiing down the runway, the nosewheel retracted on its own. It actually "[w]ent back up in the wheel weld (sic)". It unlocked itself, though it had been locked in place before landing. After the nose wheel retracted, the propeller dropped to the asphalt of the runway. This was the movement that set off the emergency signal, not the landing at all. The jury could reasonably have inferred that, since the landing was not hard enough to set off the ELT, the nosegear's retracting was a mechanical failure responsible for the accident and one for which Mr. Luttrell was not responsible.

There is no suggestion that Luttrell had not thoroughly checked the plane on the day of the accident. No evidence was presented that ruled out the incident's being caused by a mechanical or equipment failure. The jury could well have reasoned that the plane was damaged and the accident caused by the nosewheel's retracting – not the landing – and that Luttrell's conduct had nothing whatsoever to do with such failure.

II. The Writ Should Be Denied Because State Courts Committed No Reversible Error in Submitting Question No. 1 to the Jury Concerning the Defendants' Negligence and Causation of the Occurrence in Question since a Violation of Part 135 of the Federal Aviation Regulations is Not Negligence Per Se and Could Not Have Been a Proximate Cause of the Occurrence in Question.

In the plaintiff's first amended petition on which he went to trial in this case, the Petitioner alleged that the defendants were negligent because they failed to comply with a federal safety regulation, Federal Aviation Regulation (FAR) Part 135, as set forth more fully in the report of the FAA investigator on this accident, Mr. Dale Horner.

Federal Aviation Regulation Part 135 pertains to "Air Taxi Operators and Commercial Operators" and the applicable part cited by Petitioner in his application for writ of certiorari is Section 135.5 pertaining to certificate and operations specification which provides:

> "No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part . . . "

The Petitioner's expert witness, Norman Lewis Horton, testified at the trial of this case that the Federal Aviation Administration (FAA) cited Warren Luttrell for violating Section 135.5 of the Federal Aviation Regulations because he operated an aircraft without holding an air taxi/commercial operating certificate; that is, he did not have a proper license. However, Horton admitted that the FAA did not charge Luttrell or make any findings of

negligence in how he landed or operated the airplane. Specifically, Horton testified that the FAA determined an "incident" – not an accident – occurred and that the incident was the result of a hard landing. The FAA further did not find the pilot negligent for flying into a thunderstorm or for landing the plane in any way or for landing in a thunderstorm or for flying VFR as opposed to IFR. Further, he testified that the airport was not closed and the pilot was not told he could not land.

Petitioner contends that the defendants, Jackie Holmes, the owner of the airplane, and Warren Luttrell, the pilot, did not have the requisite air-taxi commercial operator's certificate and therefore violated this regulation and that such violation was negligence per se and as a matter of law, such negligence was a proximate cause or cause in whole or in part of the occurrence in question.

Petitioner concedes in his petition for writ of certiorari that neither any Texas court nor the Fifth Circuit Court of Appeals has ruled that the violation of a Federal Aviation Regulation establishes negligence per se. Certainly the regulation cited by Petitioner is not a "pilot rule of the road" that is designed to avoid accidents involving airplanes; and Petitioner cites no case authority or legislative history to show that FAR § 135.5 was designed to prevent or minimize injuries. While Petitioner cites two cases to support his contention that violations of FAR regulations constitute negligence per se, both are distinguishible from the instant case. *In Re N-500L Cases*, 691 F.2d 15 (1st Cir. 1982), did not involve a violation of § 135.5 (the licensing provision pertinent in the case), but rather focused on the pilot's "Rules of the Road" found in FAR Part 91. 691 F.2d 15, 28, 34. Similarly,

Gatenby v. Altoona Aviation Corp., 407 F.2d 443, 447 (3rd Cir. 1968), did not involve § 135.5, but rather dealt with safety standards. In the case of *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987) cited and relied upon by Petitioner, the Texas Supreme Court pointed out:

> " . . . The unexcused violation of a *statute setting an applicable standard of care constitutes negligence as a matter of law if the statute is designed to prevent an injury to that class* of persons to which the injured party belongs . . . " (Emphasis supplied)

732 S.W.2d 306, 312.

The FAR regulation relied on here is not negligence per se. It does not set an applicable standard of care, such as excessive speed, yielding the right of way, etc. Further, the Petitioner has not shown that the statute is designed to prevent an injury to that class of persons to which the Petitioner belongs.

To the contrary, Section 135.5 of the Federal Aviation Regulations is similar to the Texas driver's license requirements, Article *6687b*, Vernon's Texas Revised Civil Statutes. In *Flanigan v. Carswell*, 159 S.W.2d 598, 324 S.W.2d 835 (1959), the Texas Supreme Court rejected the Petitioner's contention that the failure to have a proper driver's license was negligence per se and a proximate cause of a collision with this observation:

> "We hold in this case that the failure of Carswell to secure a chauffeur's license, as required by statute, was not as a matter of law a proximate cause of the collision between the

> two motor vehicles involved. No fact issue on the question is raised . . . "

324 S.W.2d 835, 838.

See also, Medina v. Salinas, 736 S.W.2d 224 (Tex.App. – Corpus Christi, 1987, writ denied) and *Langdeau v. Pittman,* 337 S.W.2d 343 (Tex.Civ.App. – Austin 1960, writ refused n.r.e.).

Similarly, lack of an air-taxi/commercial operator's certificate does not, as a matter of law, make the pilot of the plane, Warren Luttrell, liable or constitute a proximate cause of the occurrence made the basis of this lawsuit.

Other Texas decisions have refused to apply negligence per se to statutory violations.

In *Continental Oil Co. v. Simpson,* 604 S.W.2d 530 (Tex.Civ.App. – Amarillo 1980, writ refused n.r.e.) the appellate court reversed and rendered judgment for the defendant, holding that the trial court erred in concluding that the failure of Continental to comply with a provision of tariff rules promulgated by the Railroad Commission of Texas was negligence per se and such noncompliance was a proximate cause of the occurrence. In doing so, the Texas appellate court noted:

> "The availability of the negligence per se rule does not mean that it is applied obdurately to the violation of every administrative rule or regulation. Neither does the mere fact that an administrative agency promulgates a rule or regulation mean that the courts must accept it as a standard for civil liability. *Carter v. William Sommerville and Son, Inc.,* 584 S.W.2d 274, 278

> (Tex. 1979). Indeed, the language of the rule comports with the principle that the power of adopting or rejecting a standard of conduct rests with the civil courts. *Rudes v. Gottschalk*, 159 Tex. 552, 324 S.W.2d 201, 205 (1959) . . . "

604 S.W.2d 530, 534.

In *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 631 (Tex. 1986), where the plaintiff admittedly was exceeding the statutory speed limit, the Texas Supreme Court held that the court of appeals erred in treating the statutory violation of the speed limit as negligence per se.

Similarly, the Third Circuit held that the violation of an OSHA regulation does not constitute negligence per se in an FELA case. *Ries v. National Railroad Passenger Corporation*, 960 F.2d 1156, 1158-65 (3rd Cir., 1992). The violation of Federal Aviation Regulation 135.5 is not negligence per se and could not be a proximate cause of the occurrence in question as a matter of law.

Petitioner argues that even if a violation of FAR Part 135 does not constitute negligence per se as to all Respondents, it does as to the pilot and should be attributed as a matter of law to Southern Pacific because the pilot was an agent of Southern Pacific under FELA.

However, Petitioner failed to show as a matter of law that Warren Luttrell was acting as an agent of Southern Pacific Transportation Company on the occasion in question and failed to raise this legal sufficiency issue before the trial court either through a motion for directed verdict, an objection to the court's charge, a motion for judgment *non obstante veredicto*, or a motion for new trial.

Petitioner, thus, waived the issue of whether Warren Luttrell, as a *matter of law*, was an agent of Southern Pacific. In *Allison v. Parks*, 763 S.W.2d 606 (Tex.App. – Fort Worth 1989, error denied), the court noted that appellants, in their motion for judgment notwithstanding the verdict, did not raise the issue of whether an easement was established as a matter of law, but rather raised points of no evidence or factually insufficient evidence. 763 S.W.2d 606, 607-8.

The *Allison* court held the "matter of law" point had not been preserved on appeal because:

> "The proper predicate for preserving a legal sufficiency point of error is to raise the issue in either a motion for instructed verdict, an objection to the submission of a vital fact issue, a motion to disregard the jury finding, a motion for judgment notwithstanding the verdict, or a motion for a new trial. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985)." 763 S.W.2d 606, 607.

Similarly, Petitioner in the instant case never raised his matter of law point through any of the procedures required by *Allison*. Petitioner did not file a motion for instructed verdict, a motion to disregard the jury finding, or a motion for judgment *non obstante veredicto*. Further, the issue of whether Luttrell was an agent of Southern Pacific's as a matter of law was never raised in Petitioner's objections to the charge nor was it raised in Petitioner's Motion for New Trial. Petitioner therefore waived the point of error of whether Warren Luttrell, as a matter of law, was Southern Pacific's agent.

Moreover, Warren Luttrell testified that he was self-employed, and he did not work for anyone. He was not paid directly by Southern Pacific. Importantly, he had no dealings with Southern Pacific at all regarding hiring him to fly.

Therefore, whether Warren Luttrell was an agent for Southern Pacific Transportation Company was an issue of fact for the jury, and was not established as a matter of law.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent, Southern Pacific Transportation Company, respectfully submits that the Petition for Writ of Certiorari be denied in all respects and that this respondent receive such other and further relief to which it may be entitled.

Respectfully submitted,

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

No. 09-91-284-CV

NICK GARCIA, Appellant

V.

SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, WARREN LUTTRELL, and SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellees

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On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-136,293

OPINION

This is the appeal of a take-nothing judgment in a jury trial of a suit for negligence at common law and under the Federal Employers' Liability Act (FELA). Nick Garcia was one of several employees of Southern Pacific Transportation Company being flown by airplane from Tucumcari, New Mexico to El Paso, Texas. Garcia alleged he received injuries during landing because the plane encountered a wind shear created by thunderstorm. Garcia raises four points of error on appeal, to-wit:

Point of error one: The trial court erred in submitting an instruction to the jury on "unavoidable accident," because there was no evidence of an unavoidable accident in this case and as a matter of law an instruction on unavoidable accident is improper in an FELA case.

Point of error two: The trial court erred in submitting Question One to the jury concerning the Defendants' negligence and causation of the occurrence in question, because the evidence conclusively established that all of the Defendants were negligent per se in conducting an unauthorized commercial aircraft operation for compensation or hire in violation of Part 135 of the Federal Aviation Regulations, and that such violation was a proximate cause and/or a cause in whole or in part of the occurrence in question.

Point of error three: The trial court erred in denying the Plaintiff's Motion for New Trial as to Defendant Warren Luttrell because the jury's "no" answer to Question One(b), concerning whether the conduct of Warren Luttrell was negligent and a cause in whole or in part of the occurrence in question, is contrary to the overwhelming weight of the evidence.

Point of error four: The trial court erred in denying the Plaintiff's Motion for New Trial as to Defendant Southern Pacific Transportation Company because as a matter of law Warren Luttrell was acting as an agent of Southern Pacific on the occasion in question.

Question One was a global submission of all elements of the cause of action under common-law negligence and FELA as to all defendants, as follows:

Was the negligence, if any, of the defendants a cause, in whole or in part, or proximate cause, of the occurrence in question, *and injury, if any*[1], to Nick Garcia:

Answer "Yes" or "No" to each of the following:

Answer "Yes" or "No"

	Proximate Cause	Cause in whole or in part
a. Jackie Holmes	No	No (10-2)
b. Warren Luttrell	No	No (10-2)
c. Gene's Flight Club of El Paso, Inc.	No	No (unam.)
d. Mike Warren	No	No (unam.)
e. Southern Pacific	No	No (unam.)

All of Garcia's points of error either challenge the charge given on the negligence and causation issues, or the sufficiency of the evidence to support the jury's finding on the negligence and causation issues. None of the points of error, or the arguments under the points of error, urge that the jury finding of no injury is against the overwhelming weight and preponderance of the evidence, or that injury was established as a matter of law. Garcia did not seek medical attention for two weeks after the incident, although he has since received treatment for a back injury. Injury was an issue at trial, but even if it was not, injury was included within Question One. The jury could have determined that, although all of the

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[1] Emphasis added.

defendants were negligent and their negligence caused the occurrence, Garcia received no injury. Such a finding would result in the answer given by the jury in this case and the take nothing judgment would then be proper unless appellant successfully challenged the "no injury" finding on appeal.

Modern jury charge practice normally combines the injury issue with the damages question. Although the "Van Zandt"[2] issue is not utilized in modern jury charge practice, the issue here is one of appellate procedure rather than charge procedure. Error in the submission of an issue is harmless when the findings of the jury in answer to other issues are sufficient to support the judgment. *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 749 (Tex. 1980); *Texas Const. Service Co. of Austin v. Allen*, 635 S.W.2d 810, 814 (Tex. App. – Corpus Christi 1982, writ ref'd n.r.e.). It is appropriate to submit a global charge to the jury, but to then obtain a reversal of the judgment entered on the jury's verdict, the appealing party must attack each and every ground upon which the verdict might have been rendered. The omission of any possible ground upon which the judgment might have been rendered compels the appellate court to affirm the judgment

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[2] Under the former special issue practice, when the existence of an injury was controverted it was not a sufficient submission of that ultimate fact issue, over objection, to inquire whether a particular negligence act was a proximate cause of plaintiff's injuries, if any, or what amount of money will compensate the plaintiff for the injuries, if any, sustained as a proximate result of the defendant's negligence, if any. *Texas & Pacific Railway Company v. Van Zandt*, 159 Tex. 178, 317 S.W.2d 528 (1958).

as it finds support in grounds not raised as error on appeal. When the jury fails to find that the plaintiff has been injured, all other issues become immaterial. *Burnett v. File*, 552 S.W.2d 955, 958 (Tex. Civ. App. – Waco 1977, writ ref'd n.r.e.). This is similar to the situation which arises when the jury finds negligence but fails to find damages; the plaintiff must challenge both findings to obtain reversal on appeal. *Tate v. Sharp*, 831 S.W.2d 899, 900 (Tex. App. – Beaumont 1992, no writ). Assuming we find error in each of the points of error, we cannot find that the trial court erred in entering the take-nothing judgment because appellant does not challenge the implied finding that he failed to prove injury by a preponderance of the evidence.

We are not authorized to reverse the judgment of the trial court unless the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. TEX. R. APP. P. 81(b)(1). The broad form jury question combined negligence, proximate cause and injury. If negligence and proximate cause were found by the jury, but no injury, the jury would have answered "no" to all defendants, as it did. Assuming without deciding that such a "no injury" finding would be against the overwhelming weight and preponderance of the evidence, appellant does not challenge such a finding by point of error. Therefore, there is a theory submitted to the jury which supports the take-nothing judgment regardless of the merit of appellant's points of error.

Points of error one through four are overruled. The judgment is affirmed.

AFFIRMED.

PER CURIAM

Opinion Delivered
December 3, 1992
Do Not Publish

Before Walker, C.J., Brookshire and Burgess, JJ.